STATE OF MICHIGAN
IN THE SUPREME COURT

KIM SAFFIAN,

Plaintiff/Appellee

v

ROBERT R. SIMMONS, DDS,

Defendant/Appellant.

Supreme Court No: 129263
Court of Appeals No: 250645
Circuit Court No. 01-6896-NH

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PLAINTIFF/APPELLEE'S SUPPLEMENTAL BRIEF

****ORAL ARGUMENT REQUESTED****

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STATEMENT OF JURISDICTION

This supplemental brief is filed by Plaintiff/Appellee pursuant to this Court's order, entered May 26, 2006, directing the Clerk to schedule oral argument on Defendant/Appellant's application for leave to appeal, and inviting the parties to file supplemental briefs on three specified issues.

SUPPLEMENTAL ARGUMENT

The trial court's decision to reinstate the default against Defendant was not an abuse of discretion, where the reasons proffered by Defendant to set aside the default were later called into serious question.

On August 28, 2001, Plaintiff filed a complaint, along with an affidavit of merit that was signed by Dr. Mark Nearing, DDS, and notarized. Defendant was served on September 13, 2001, yet failed to file any responsive pleading within the 21 days provided by law. Therefore, a default was entered on October 4, 2001.

Defendant moved to set aside the default, arguing that good cause existed to set it aside because he had faxed the complaint to his insurer, but the transmission failed. In support of the motion, Defendant submitted an affidavit of one of his employees, Mona Wilson. Ms. Wilson stated that she personally faxed the summons and complaint to Defendant's insurer, and that the fax machine did not print an error report. Therefore, she believed that the insurer would handle the matter, and did not follow up with the insurer.

Defendant asked for the default to be set aside due to the "innocent circumstances" of the failed fax transmission. The trial court set aside the default on that basis.

As argued in Plaintiff's brief in opposition to the application for leave to appeal, the trial court abused its discretion by granting the motion to set aside the default. Even assuming that Defendant's assertions about the fax were true, such a paltry attempt to send the complaint to the insurer does not constitute good cause to set aside a default. The duty to answer was Defendant's, not his insurer's. Defendant did not even place a

follow-up phone call to his insurer. The default should never have been set aside in the first place, and that provides an alternative basis to affirm the trial court's ruling.

In any event, discovery revealed that no long-distance call was placed on the day Ms. Wilson claimed to have faxed the complaint to the insurer. This called into serious question her assertion that she made a fax transmission, but that the transmission simply failed for an unknown reason. The trial court specifically found that this new information "reflects on the credibility of the assertion that indeed this fax was attempted or occurred."[1] The trial court therefore reconsidered its ruling that had set aside the default, and reinstated the default.

The Court of Appeals majority affirmed this ruling. The dissenting judge (Judge Zahra) concurred with the legal proposition (see issue 3, below) that Defendant had a duty to file a timely responsive pleading, despite the affidavit of merit's deficiency. However, Judge Zahra opined that the trial court should not have reinstated the default absent an evidentiary hearing. This Court has asked the parties to address this issue.

Judge Zahra correctly pointed out that "a motion for reconsideration of setting aside default is properly granted when evidence is presented that 'seriously call[s] into question' the factual allegations contained in the affidavit supplied in support of the motion to set aside the default." *Saffian v Simmons*, 267 Mich App 297, 316; 704 NW2d 722 (2005), quoting *Michigan Bank v Reynaert, Inc*, 165 Mich App 630, 646; 419 NW2d 439 (1988). However, Judge Zahra believed that it was an abuse of discretion for the trial court to decide the motion without first conducting an evidentiary hearing. *Id.*, 316-317. Contrary to that conclusion, the trial court did not need to conduct an evidentiary hearing in this case.

In *St Clair Commercial & Savings Bank v Macauley*, 66 Mich App 210, 214-215; 238 NW2d 806 (1975), this Court held that it was an abuse of discretion for the trial court to set aside a divorce judgment due to fraud on the court, without first conducting an evidentiary hearing. However, in *St Clair*, the plaintiff requested an evidentiary hearing, and the trial court refused to conduct one. *Id.*, 215. In this case, Defendant did not request an evidentiary hearing. Moreover, in *St Clair*, the court set aside a judgment for fraud. To set aside a judgment for fraud requires proof "of the highest order," which is why an evidentiary hearing is ordinarily required. *Kiefer v Kiefer*, 212 Mich App 176, 179; 536 NW2d 873 (1995). In this case, the trial court was not asked to set aside a judgment, but only to reconsider its prior ruling on a motion.

MCR 2.119 governs motion practice. Under MCR 2.119(F), the trial court had the authority to reconsider its prior rulings on motions. And under MCR 2.119(E)(2), when a motion is based on facts not appearing of record, the court may hear the motion by oral testimony, or by affidavit. Here, the trial court was presented with affidavits, deposition testimony, and documentary evidence. And Defendant did not request an evidentiary hearing on the matter. Therefore, the trial court did not abuse its discretion by deciding the motion without an evidentiary hearing. There has been no showing that an evidentiary hearing would assist the trial court in making its determination—there has been no offer of proof from Defendant, let alone even a request for such a hearing.

The trial court was within its discretion to reconsider its prior ruling setting aside the default, and it is unnecessary to remand for an evidentiary hearing.

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[1] Tr IV, pp 3-4.

The complaint and facially valid affidavit of merit were sufficient to commence a cause of action.

In *Scarsella v Pollack*, 461 Mich 547, 549; 607 NW2d 711 (2000), this Court held that the filing of a complaint without an affidavit of merit is insufficient to commence a cause of action for purposes of tolling the statute of limitations. This Court noted that it was not addressing a situation where an affidavit was filed with the complaint but later found to be defective.

> Today, we address only the situation in which a medical malpractice plaintiff wholly omits to file the affidavit required by MCL 600.2912d(1). In such an instance, the filing of the complaint is ineffective, and does not work a tolling of the applicable period of limitation. This holding does not extend to a situation in which a court subsequently determines that a timely filed affidavit is inadequate or defective. [*Id.*, 553.]

This Court went on to further note, "We do not decide today how well the affidavit must be framed. Whether a timely filed affidavit that is grossly nonconforming to the statute tolls the statute is a question we save for later decisional development." *Id.*, 553 n 7.

However, in *Mouradian v Goldberg*, 256 Mich App 566, 574; 664 NW2d 805 (2003), the Court of Appeals held that filing a complaint with an affidavit of merit that was grossly nonconforming to the statutory requirements of MCL 600.2912d(1) did not toll the limitations period. And in *Geralds v Munson Healthcare*, 259 Mich App 225, 240; 673 NW2d 792 (2003), the Court of Appeals extended *Scarsella* and *Geralds* to an affidavit of merit that was deficient in any capacity, reasoning that whether an affidavit was "defective," "inadequate," or "grossly nonconforming" was merely a matter of semantics.

Mouradian and *Geralds* go beyond what this Court ruled in *Scarsella*. For the reasons persuasively set forth by the Court of Appeals majority in *Kirkaldy v Rim*, 266 Mich App 626; 702 NW2d 686 (2005), this Court should re-examine *Scarsella* and its progeny, and hold that the filing of a facially valid affidavit of merit, as in this case, is sufficient to commence the action and toll the statute of limitations. Any subsequent determination that the affidavit was deficient would subject the case to dismissal without prejudice. Plaintiff/Appellee adopts the reasoning of the Court of Appeals opinion in *Kirkaldy*, and urges this Court to adopt the same.

However, Plaintiff does not desire to belabor this point. Even if a complaint filed with a facially valid but technically deficient affidavit of merit does not toll the limitations period, the Court of Appeals correctly ruled that a defendant may not disregard its duty to file a timely responsive pleading when served with a complaint and a facially valid affidavit of merit.

Even if the complaint and affidavit of merit were insufficient to commence the action for statute of limitations purposes, Defendant was required to file a timely responsive pleading.

Both the majority and the dissenting judge in the Court of Appeals agreed on the central legal principle in this case—that a defendant served with a medical-malpractice complaint and facially valid affidavit of merit has a duty to file a timely responsive pleading, or risk entry of default. The Court of Appeals was correct.

Generally, a defendant served with a summons and complaint must file a responsive pleading within 21 days. However, in medical-malpractice actions, the duty to answer is triggered only when the complaint is accompanied by an affidavit of merit.

MCR 2.108(A)(6); MCL 600.2912e(1). Here, the complaint was accompanied by an affidavit of merit. The fact that the affidavit was subsequently determined to be deficient (in that it was signed by an expert in root canals, when the defendant-dentist was a general practitioner who had performed a root canal on plaintiff) did not change this fact. Therefore, this case is distinguishable from *White v Busuito*, 230 Mich App 71, 77; 583 NW2d 499 (1998), where no affidavit of merit was filed at all.

Defendant wishes this Court to engage in a legal fiction, and hold that there was no affidavit of merit filed in this case. Defendant argues that "the Complaint in this case was filed without an affidavit of merit."[2] That assertion is factually untrue. Defendant relies on the legal "fiction" that a defective affidavit (no matter how technical the deficiency) is no affidavit at all. Such a "fiction" strains common sense and a plain reading of the applicable statutes. Where a defendant is served with a complaint and affidavit of merit, the defendant must file a timely responsive pleading.

MCL 600.2912e(1) provides that the defendant must file a responsive pleading "within 21 days after the plaintiff has filed an affidavit in compliance with section 2912d." The "in compliance with" language cannot be read as allowing the defendant to engage in a unilateral determination whether the affidavit withstands scrutiny in all details; rather, as Judge Zahra aptly noted, that language simply identifies the type of affidavit required. In other words, it is legislative "shorthand" for identifying an *affidavit of merit*, as opposed to any number of other kinds of affidavits (e.g., affidavit of meritorious defense, or nonmilitary affidavit). Judge Zahra's explanation provides an excellent summary:

> [T]he use of the phrase "in compliance with MCL 600.2912d"

[2] Supplemental brief, p 4.

> in MCL 600.2912e and the phrase "required by MCL 600.2912d" in MCR 2.108(A)(6) do not authorize a defendant to unilaterally determine whether plaintiff's affidavit of merit satisfies the detailed requirements of MCL 600.2912d. Rather, these phrases merely identify the type of affidavit that, if filed with the complaint, triggers defendant's obligation to answer or otherwise file a responsive pleading to the complaint. This is not to say that a plaintiff may pursue a medical malpractice action with a defective affidavit of merit. A defendant may challenge a statutorily defective affidavit by responsive pleading, motion or assertion of an affirmative defense. A defendant may not, however, ignore a complaint, allow a default judgment to be taken and later attack the judgment on the basis of a defective affidavit. [*Saffian*, 267 Mich App at 312.]

To hold otherwise would encourage gamesmanship, and would frustrate the finality of judgments. A defendant could allow entry of a default and then a default judgment. Then, when the plaintiff attempts to execute the judgment (which may be done for a ten-year period after entry), the defendant could seek relief from the judgment on the basis that it is void because no suit ever commenced that triggered a duty to respond. Such a position is not dictated by the applicable statutory language, and would unduly interfere with the orderly resolution of disputes and the finality of judgments.

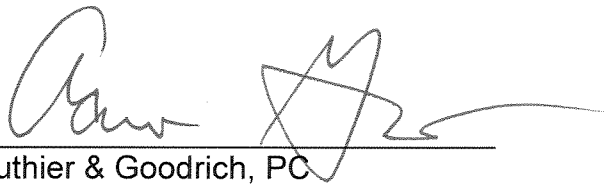
The Court of Appeals ruling on this issue was correct, and this Court should either deny the application, or affirm the Court of Appeals.

RELIEF REQUESTED

For all of the reasons set forth in this supplemental brief, as well as the previously filed brief in this matter, Plaintiff respectfully request that this Honorable Court either DENY Defendant's application for leave to appeal, or in the alternative, AFFIRM the Court of Appeals.

Dated: July 5, 2006

Respectfully submitted,



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